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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ELUID GONZALES GUERRA,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the ex post facto clause is violated when a criminal offense, which occurred prior to the effective date of the United States Sentencing Guidelines and is sentenced as such along with a separate and distinct criminal offense occurring after the effective date of the Guidelines, is considered as relevant conduct in enhancing the sentence rendered for the Guidelines offense.

II. Whether the Fifth Circuit Court of Appeals in utilizing the "without foundation" standard of review in determining whether a defendant has accepted responsibility under the United

States Guidelines:

a) Is in conflict with other Circuit Courts of Appeals which utilize the "clearly erroneous" standard of review; and

b) Where such a standard review has no historical basis, and thus offends due process.

III. Whether "acceptance of responsibility" under the United States Sentencing Guidelines requires a defendant to accept responsibility for uncharged conduct.

LIST OF PARTIES IN APPELLATE COURT

Eluid Gonzales Guerra,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on March 31, 1993. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. The ex post facto clause contained within Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law."

2. The Fifth Amendment to the United States Constitution states:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Houston Division. References herein shall be made to the Pre-Sentence Investigation Report, by the designation "PSR".

On November 9, 1990, the Petitioner was indicted, along with three other co-defendants, by a federal grand jury, charging him with conspiracy to possess with intent to distribute marijuana, distribution of marijuana, use of a communication facility which facilitated the commission of a felony under the Controlled Substances Act, the filing of false tax returns for the years 1985 and 1986; and unlawful entry by a previously

deported alien.

The Petitioner entered a plea of guilty to all charges. The filing of a false tax return and the unlawful entry were the only crimes sentenced under the United States Sentencing Guidelines.

The Pre-Sentence Investigation Report reveals that on February 21, 1986, following the execution of a search warrant, six notebooks were seized from the residence of co-defendants Efraim and Elma Guerra. (PSR:¶ 21). Analysis of the notebooks found them consistent with records used to make narcotics transactions (PSR:¶ 23).

The notebooks seized documented that from early 1984 through 1985 the Petitioner along with others were involved in narcotics trafficking. Customers of the organization corroborated the

transactions found in the notebooks. (PSR:¶ 24).

From 1982 through December 1987, the Petitioner was a self-employed truck driver while being in the marijuana business. The Petitioner allegedly failed to report any gross receipts, as recorded in the narcotic notebooks, as income on his Form 1040 income tax return for the years 1984 through 1987. (PSR:¶ 28). The only income reported by the Petitioner was for his trucking and farming business. Id.

Case investigative material reflected that the amount of marijuana connected with the drug conspiracy was 6,211 pounds and the gross narcotics receipts were in excess of Two Million Dollars. (PSR:¶ 35-36).

The Petitioner received a total of ninety-six (96) months for the three counts that were sentenced under the Sentencing Guidelines.

ARGUMENT

I.

THE USE OF A PRE-GUIDELINE OFFENSE TO ENHANCE THE SENTENCE FOR AN UNRELATED POST-GUIDELINE OFFENSE, BY FINDING THAT DEFENDANT PLAYED AN AGGRAVATING ROLE, VIOLATES THE EX POST FACTO CLAUSE

To find that a defendant plays an aggravating role under the United States Sentencing Guidelines due to a pre-guideline crime, for which a plea of guilty has been entered, amounts to a "backdoor" usage of pre-guideline activity. If criminal activity occurs prior to the effective date of the sentencing guidelines, it is clearly an ex post facto application of the guidelines to count this pre-guideline crime as relevant conduct to subsequent distinct post-guideline criminal activity. In holding that an adjudicated pre-guideline

offense can be considered relevant conduct for criminal activity occurring after the effective date of the sentencing guidelines, the Fifth Circuit rendered a decision in conflict with this Honorable Court's holding in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351; and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). See U.S. Supreme Court Rule 10.1(c).

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto law". See Art. I, § 9, cl.3; Art. I, § 10, cl.1. The *ex post facto* prohibition forbids the enactment of any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."

Weaver v. Graham, 450 U.S. at 28. In order for a criminal law to be *ex post facto* law, it must not apply to events occurring before its enactment and it must not disadvantage the offender. Id.

The Fifth Circuit's holding is also in conflict with other Fifth Circuit decisions and other federal circuit courts of appeals, on the issue of whether the guidelines were applied in a manner that violated the Ex Post Facto clause. See U.S. Supreme Court Rule 10.1(a).

This Honorable Court in Weaver expressly stated that the prohibition forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. The critical question being "whether the law changes the legal consequences of acts completed before its effective date." 450

U.S. at 31.

In Miller v. Florida, 482 U.S. 423 (1987), this Honorable Court addressed the ex post facto application of the sentencing guidelines for the State of Florida. Specifically, the Court concentrated on the occurrence of crimes before the effective date of the law.

The central issue in Miller v. Florida was which version of the sentencing guidelines would the defendant be sentenced under, the guidelines in effect at the time the crime was committed or the amended version which was in effect at the time of sentencing. The central concern to the Court was whether the legislature had increased punishment beyond what was prescribed when the crime was consummated. The Court held that using the guidelines in effect at the time

of sentencing made more "onerous the punishment for [the crime] committed before its enactment", and therefore violated the *(ex post facto)* clause. 482 U.S. at 435.

In the case at bar, the Petitioner simultaneously pled guilty to the pre-guidelines offense of conspiracy to possess with intent to distribute marijuana, and the post-guidelines offense of filing a false tax return. The Fifth Circuit upheld the finding that since the Petitioner had a "leadership" role in the marijuana conspiracy, this could be used to enhance his sentence under the guidelines for playing an aggravating role in relation to the crime of filing a false tax return.

The activities of the charged conspiracy ceased to exist before the

initial application of the United States Sentencing Guidelines became effective. Therefore, for that offense the Petitioner was sentenced according to the laws in effect prior to the implications of the sentencing guidelines. However, in calculating a sentence under the guidelines for the offense of filing a false tax return, the court used the conduct involved with the pre-guidelines crime of conspiracy, to increase the sentence of the post-guidelines crime of filing a false tax return. It is apparent that the four (4) level increase, received due to his alleged leadership role in the marijuana conspiracy, amounted to a sentence received under the guidelines for criminal activity that occurred prior to its enactment. This clearly was a retrospective use of the sentencing

guidelines which resulted in a more onerous punishment, and thus violated the *(ex post facto)* clause.

The Circuit Courts of Appeals, including the Fifth Circuit, have recognized that an increased sentence based on an amendment to the guidelines effective after the offense was committed is an obvious violation of the *(ex post facto)* clause in Article I of the United States Constitution. See United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Young, 932 F.2d 1035, 1038 n. 3 (2nd Cir. 1991); United States v. Kopp, 951 F.2d 521, 526 (3rd Cir. 1991); United States v. Morrow, 925 F.2d 779, 782-83 (4th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990); United States v. Nagi, 947 F.2d 211, 213 n. 1 (6th Cir. 1991),

cert. denied, --- U.S. ---, 112 S.Ct. 2309, 119 L.Ed.2d 230 (1992); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n. 3 (10th Cir.), cert. denied, --- U.S. ---, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991); United States v. Worthy, 915 F.2d 1514, 1516 n. 7 (11th Cir. 1990); and United States v. Lam Kwong-Wah, 924 F.2d 298, 304-05 (D.C. Cir. 1991).

Although the instant case is not analogous with that exact scenario involving amendments to the guidelines, the same logic should apply in the collateral use of pre-guidelines conduct to calculate an offense level for post-guidelines conduct. This simply amounts to an unconstitutional use of the

sentencing guidelines by circumventing the prohibition against *(ex post facto)* laws.

Simply put, the Petitioner received a greater sentence due to criminal conduct occurring prior to the effective date of the sentencing guidelines. A "lawmaker cannot retroactively foreclose even the *possibility* that a criminal defendant would receive a lesser sentence than was potentially available at the time the crime was committed." Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988); citing Lindsey v. Washington, 301 U.S. 397 (1937). As the Court is aware, sentences received under the sentencing guidelines are without the benefit of parole. So the practical effect on the Petitioner was that he received a lengthier sentence without parole due to his plea of guilty to a pre-guideline crime for which he

received a separate sentence.

The panel has rendered an opinion affirming an unconstitutional application of the United States Sentencing Guidelines, which is in conflict with the decisions of this Honorable Court, and other Circuit Courts of Appeals, including the Fifth Circuit. Therefore, a compelling bases exists for this Court to grant the instant Petition for Writ of Certiorari.

II.

THE FIFTH CIRCUIT'S USE OF THE "WITHOUT FOUNDATION" STANDARD OF REVIEW IN REGARDS TO THE "ACCEPTANCE OF RESPONSIBILITY" PROVISION OF THE SENTENCING GUIDELINES IS ERRONEOUS

In reviewing the failure to find "acceptance of responsibility" under Section 3E1.1 of the United States Sentencing Guidelines, the Fifth Circuit held that the district court's findings

are entitled to "greater deference" on review than that conferred under the "clearly erroneous" standard, and thus the district court's conclusion will stand unless the defendant proves the determination was "without foundation". The use of this standard of review by the Fifth Circuit is in conflict with other Federal Circuit Courts of Appeals. See U.S. Supreme Court Rule 10.1(a).

In reviewing a district court's finding under Section 3E1.1 U.S.S.G., the Second, Third, Sixth, Seventh, Ninth and Tenth Circuits have held that determination of "acceptance of responsibility" is a finding of fact that is reviewed under the clearly erroneous standard. See United States v. Restrepo, 936 F.2d 661 (2nd Cir. 1991); United States v. Riviere, 924 F.2d 1289 (3rd Cir.

1991); United States v. Payne, 962 F.2d 1228 (6th Cir. 1992); United States v. Antzoulatos, 962 F.2d 720 (7th Cir. 1992); United States v. Marquardt, 949 F.2d 283 (9th Cir. 1991); and United States v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991), cert. denied, 112 S.Ct. 1565.

Furthermore, Petitioner would argue that the "without foundation" standard utilized by the Fifth Circuit has no historical basis. Additionally such a standard denies a defendant a fair determination on the issue of whether a defendant has "accepted responsibility". The ultimate effect is, that despite the entry of a plea of guilty to the charged conduct, there appears to exist a presumption that there is no acceptance of responsibility. On the other hand, since the inception of the Federal Sentencing

Guidelines, all circuits have reviewed findings of fact for "clear error". 18 U.S.C. § 3742(e); see also United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991), cert. denied, --- U.S. ---, 112 S.Ct. 1590, 118 L.Ed.2d 307 (1992).

Therefore, this Honorable Court needs to lend guidance to the Circuit Courts of Appeals as to the appropriate standard of review for a finding of "acceptance of responsibility", or the lack thereof under Section 3E1.1 U.S.S.G.. For that reason a compelling basis exists for this Court to grant the instant Petition for Writ of Certiorari.

III.

A REDUCTION IN SENTENCE FOR "ACCEPTANCE OF RESPONSIBILITY" DOES NOT REQUIRE ACKNOWLEDGEMENT OF ALL CRIMINAL CONDUCT, ESPECIALLY IN LIGHT OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Circuit upheld the district court's finding that the Petitioner was not entitled to the appropriate sentence reduction under Section 3E1.1 U.S.S.G., partially because he did not acknowledge his participation in two uncharged murders in Mexico. The panel's decision is in conflict with the decisions of other Circuit Courts of Appeals, which have held that credit for "acceptance of responsibility" does not include uncharged conduct. See U.S. Supreme Court Rule 10.1(c).

The instant indictment charged the Petitioner with committing various federal

crimes within the jurisdiction of the United States. Not only did the alleged murders occur outside the jurisdiction of the United States, but simply no reliable factual basis was established to connect those acts with the instant indictment. In United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); the First Circuit concluded that "acceptance of personal responsibility for . . . criminal conduct means the criminal conduct to which the defendant pleads guilty." In particular, the Guidelines require acceptance of responsibility for the criminal conduct which formed the basis of the specific counts of the indictment. Furthermore, the First Circuit ruled that by requiring a defendant to make inculpatory statements as to uncharged conduct, in order to receive credit for "acceptance of

responsibility", would penalize the exercise of the Fifth Amendment privilege against self-incrimination. 873 F.2d at 463, citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977). Accordingly, this holding is in conflict with the panel's decision in the instant case.

In United States v. Oliveras, 905 F.2d 623 (2nd Cir. 1990), the Second Circuit held that the district court could not properly deny the defendant credit for acceptance of responsibility on the basis of his denial of prior narcotics transactions. In Oliveras, the district court did not credit the defendant for acceptance of responsibility because he did not acknowledge his participation in criminal activity other than for which he pled guilty.

The First Circuit expressed its concern that requiring the assumption of responsibility for crimes not pled or charged violates the Fifth Amendment privilege against self-incrimination. 905 F.2d at 626. The Court reasoned that as long as the statements are not immunized against use in subsequent criminal prosecution, to accept responsibility for crimes other than those to which he pled guilty would penalize him for refusing to incriminate himself. Id.

Furthermore, the Court in Oliveras cited this Honorable Court in Minnesota v. Murphy, 465 U.S. 420 (1983), for the proposition that the government cannot penalize a person because that person elects to assert their constitutional right not to make incriminating statements. To require a defendant to

accept responsibility for crimes other than those to which he has pled guilty forces defendants to choose between incriminating themselves as to conduct for which they have not been immunized or forfeiting substantial reductions in their sentence.

Likewise, the panel in the instant case has rendered a decision in conflict with United States v. Santiago, 906 F.2d 867 (2nd Cir. 1990). In Santiago, the Second Circuit ruled that the Guidelines do not require a defendant to accept responsibility for crimes other than those to which he had pleaded guilty in order to earn the credit for acceptance of responsibility. The Court noted that to impose such a requirement would violate the Fifth Amendment privilege against self-incrimination. 906 F.2d at 873.

To require the Petitioner to acknowledge his involvement in uncharged and unsubstantiated criminal activity would be a clear violation of his Fifth Amendment right, and effectively make him a witness against himself in the event of a future criminal prosecution. The district court and the panel hearing this case have rendered decisions which are directly in conflict with the decisions of those Circuit Courts cited above.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals and vacate the sentence and remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 28th day of June, 1993. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

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